

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

NAOIA FANENE,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2228-E

PERB Decision No. 1512

March 25, 2003

Appearance: Naoia Fanene, on her own behalf.

Before Baker, Whitehead and Neima Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Naoia Fanene (Fanene) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by terminating her in retaliation for her union activities.

After reviewing the entire record in this matter, including Fanene's unfair practice charge, the warning and dismissal letters and Fanene's appeal, the Board adopts the Board agent's dismissal as the decision of the Board itself as modified in the discussion section below.

¹EERA is codified at Government Code section 3540 et seq.

DISCUSSION

After Fanene filed her unfair practice charge, she was sent a warning letter by the Board agent informing her of the deficiencies in the original charge. The Board agent provided Fanene detailed instructions on how to file an amended charge and expressly warned her that any amended charge must be served on the District. The original deadline for filing an amended charge was January 22, 2002. At Fanene's request, this deadline was extended until January 29, 2002. It was not until February 7, 2002, that Fanene sent the Board agent a cover letter and a memorandum with factual allegations under the heading, "How was my Union Involvement related to My Termination from OUSD." Fanene did not serve this document on the District as required. In any event, the Board agent concluded that this letter and memorandum failed to cure the deficiencies in the warning letter and dismissed Fanene's charge. On appeal, Fanene argues that the Board agent erred in dismissing her charge.

The Board must decide this case based on the record. Because Fanene did not serve the February 7, 2002, letter and memorandum on the District, they are not part of the record. Thus, the Board agent should not have referenced them in the dismissal letter. Accordingly, the Board does not adopt the portion of the dismissal letter discussing Fanene's letter and memorandum entitled, "How was my Union Involvement related to My Termination from OUSD."

The record before the Board contains numerous allegations by Fanene regarding her interactions with coworkers, supervisors and others from 1998 through 2001. She offers this material as evidence of the District's harassment of her over this time period. She also describes in detail the various disciplinary actions taken against her during this time period

including her termination and contests the validity of each action. She argues that even in the midst of harassment she was able to efficiently complete her work.

The Board agent correctly found that Fanene has not stated a prima facie case. Although Fanene discusses her union activity of serving as the chairperson of a union committee that advocated for the reinstatement of a supplemental annuity for unit employees and that management was aware of her role with the union, she does not provide an adequate nexus between this protected activity and her termination. The allegation that the District's human resources director appeared to withdraw his support for her and stopped protecting her from disciplinary action is too conclusory and remote to establish a prima facie case.

ORDER

The unfair practice charge in Case No. SF-CE-2228-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

Dismissal Letter

February 11, 2002

Naoia Fanene
1435 2nd Avenue
Oakland, California 94606

Re: Naoia Fanene v. Oakland Unified School District
Unfair Practice Charge No. SF-CE-2228-E
DISMISSAL LETTER

Dear Ms. Fanene:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 14, 2001. Naoia Fanene alleges that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by terminating her in retaliation for union activities.

I indicated to you in my attached letter dated December 26, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 22, 2002, the charge would be dismissed.

On or about January 22, 2002, I granted you an extension of time until January 29, 2002 to file an amended charge. No amended charge was received by January 29, 2002. I contacted you on or about February 5, 2002. You indicated you were having difficulties responding. On February 7, 2002, you submitted a cover letter and a memorandum with factual allegations under the heading, "How was my Union Involvement related to My Termination from OUSD." This memorandum recounts contacts with the Service Employees International Union regarding the District's failure and/or refusal to implement payments to employees' annuity account per the recently negotiated agreement, in which you played a hand. These allegations fail to cure the deficiencies identified in my December 26, 2001 letter. Your February 7, 2002 submission also indicated that you were continuing to work on providing additional information. However, as of this date, nothing further has been received. You have been provided ample opportunity to file an amended charge, but have failed to do so. Therefore, I am dismissing the charge based on the facts and reasons set forth herein as well as those contained in my December 26, 2001 letter.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Donn Ginoza
Regional Attorney

Attachment

cc: Mike Helms

DNG

Warning Letter

December 26, 2001

Naoia Fanene
1435 2nd Avenue
Oakland, California 94606

Re: Naoia Fanene v. Oakland Unified School District
Unfair Practice Charge No. SF-CE-2228-E
WARNING LETTER

Dear Ms. Fanene:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 14, 2001. Naoia Fanene alleges that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by terminating her in retaliation for union activities.

Investigation of the charge revealed the following. Fanene was employed by the Oakland Unified School District as a Senior Account Clerk II until her termination in the spring of 2001. She was a member of the bargaining unit exclusively represented by the Service Employees International Union, Local 790 (SEIU).

On or about February 1, 2001, the District notified Fanene of its intent to take disciplinary action against her. At the Skelly hearing, the District notified Fanene that she was being terminated for "incompetency [sic] or inefficiency in performances of duty," "inability or unwillingness to perform work as required or directed," "discourteous, offensive or abusive conduct or language toward school District officers, other employees, pupils or the public," and "willful failure of good conduct tending to injure the lawful interest of the school District." Documents and verbal testimony were presented to the District's hearing officer, Barbara Elmore, Human Resources Coordinator.

By letter dated March 8, 2001, Elmore informed Fanene that she was sustaining the recommendation based on evidence of discourteous and abusive conduct, inefficiency in the performance of duties, and unwillingness to perform work as required or directed.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In its response to the charge the District provides additional detail regarding these matters. It indicates that in March 1999, the Program/Attendance Accounting Department, to which Fanene as assigned, began documenting incidents in which Fanene allegedly displayed inappropriate or unprofessional conduct. This information was forwarded to Charging Party by the undersigned.

A March 2, 1999 incident occurred at the Alameda County Auditor's office, while Fanene was making a deposit. A counseling meeting was held as a result. Although a suspension without pay was proposed, the discipline was reduced to a letter of reprimand.

On or about May 13, 1999, Fanene was allegedly offensive and abusive toward a co-worker. Although a termination was proposed, the discipline was reduced to a five-day suspension.

On or about November 29, 2000, a deficiency notice was placed in Fanene's personnel file regarding complaints and desk duties, as well as insulting and demeaning tone used toward District employees and vendors.

On or about December 21, 2000, Fanene was allegedly uncooperative and insulting in responding to a question by her supervisor regarding procedures Fanene followed.

Fanene asserts that the District terminated her because of personal differences with her supervisor that were aggravated by "harassment, intimidation, and badgering." She began to suffer this unfair treatment in the first week of her employment. Other workers were granted privileges she was denied. Fanene also served as the chairperson of an SEIU committee that advocated for the reinstatement of a supplemental annuity for unit employees. These activities were instrumental in the restoration of benefits for employees in May 1999. After Fanene complained about problems in the implementation of the provisions, the District's negotiator and human resource director, Mike Helms, who had been protecting her from disciplinary action, appeared to withdraw his support for her, beginning in the spring of 2000.

The District and SEIU were parties' to a collective bargaining agreement effective from July 1, 1998 through June 30, 2001. The contract, at article 9, section A contains a no-reprisal clause reading as follows:

The District shall not discriminate against, sexually harass, or harass any unit member on the basis of age, creed, sex, race, ethnic background, marital or veteran status, national origin, disability, sexual orientation, religion, or membership in [SEIU] or participation in its activities. The District shall comply with Federal State Laws in respect to administering this Agreement regarding an employee with AIDS or AIDS-related condition.

Article 28, "Grievance Arbitration and Appeal Procedure for Disciplinary Actions," section 5.V provides for binding arbitration of grievances, except in cases of disciplinary appeals.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA

The theory of the case is that the District retaliated against Fanene because of her union activities. To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, *supra*, PERB Decision No. 210; North Sacramento School District, *supra*, PERB Decision No. 264.)

At the present, the charge fails to include sufficient information from which it can be concluded that Fanene's protected activities motivated the District's decision to terminate her. There is no specific evidence as to each of the alleged incidents underlying the termination that fulfills the elements of proof described above.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would require a different conclusion than the one explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the Charging Party. The amended charge must be served on the Respondent and the original proof of service filed with PERB. If I do not receive an amended charge or withdrawal from you before **January 22, 2002**, I shall dismiss your charge. If you

SF-CE-2228-E
December 26, 2001
Page 4

have any questions, please call me at the above telephone number.

Sincerely,

Donn Ginoza
Regional Attorney

DNG